



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

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NOV 03 1999

**VIA FACSIMILE (202-296-7937) and  
CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

Mr. Karl R. Moor  
Vice President and  
Associate General Council  
Southern Company  
1130 Connecticut Avenue, N.W., Suite 830  
Washington, DC 20036

SUBJ: Notice of Violation

Dear Mr. Moor:

Enclosed is a Notice of Violation (NOV) issued to Southern Company Services, Inc., Georgia Power Company, Alabama Power Company, Mississippi Power Company, Gulf Power Company, and Savannah Electric & Power Company under Section 113(a)(1) of the Clean Air Act, 42 U.S.C. §7413(a)(1). In the NOV, the Environmental Protection Agency notifies those companies of violations of pre-construction permitting requirements under federal regulations and under State Implementation Plans at the power plants identified in the NOV.

Please note the opportunity to confer outlined in the NOV. As indicated in the NOV, any request to confer should be directed to my attention.

Sincerely,

A handwritten signature in cursive script that reads "Charles V. Mikalian".

Charles V. Mikalian  
Associate Regional Counsel

Enclosure

EPA40RC001878

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF:

Southern Company Services,  
Inc., Georgia Power Company, Alabama  
Power Company, Mississippi Power  
Company, Gulf Power Company, and  
Savannah Electric & Power Company

Proceedings Pursuant to  
Section 113(a)(1) of the  
Clean Air Act, 42 U.S.C.  
§7413(a)(1)

Notice of Violation

EPA-CAA-2000-04-0006

NOTICE OF VIOLATION

This Notice of Violation ("NOV") is issued to Southern Company Services, Inc. (Southern), Georgia Power Company, Alabama Power Company, Mississippi Power Company, Gulf Power Company, and Savannah Electric & Power Company (hereinafter referred to collectively as the "Southern Companies") for violations of the Clean Air Act ("the Act") at the coal-fired power plants identified below. The Southern Companies have embarked on a program of modifications intended to extend the useful life, regain lost generating capacity, and/or increase capacity at their coal-fired power plants.

Commencing at various times from 1977 to the present, the Southern Companies have modified and operated the coal-fired power plants identified below without obtaining New Source Review ("NSR") permits authorizing the construction and operation of physical modifications at their boiler units as required by the Act. In addition, for each physical modification at these power plants, the Southern Companies have operated these modifications without installing pollution control equipment required by the Act. These violations of the Act and the State Implementation Plans ("SIP") of Georgia, Alabama, Mississippi and Florida have resulted in the release of massive amounts of Sulfur Dioxide ("SO<sub>2</sub>"), Nitrogen Oxides ("NO<sub>x</sub>"), and Particulate Matter ("PM") into the environment. Until these violations are corrected, the Southern Companies will continue to release massive amounts of illegal SO<sub>2</sub>, NO<sub>x</sub>, and PM into the environment.

This NOV is issued pursuant to Section 113(a)(1) of the Act, as amended, 42 U.S.C.A. Section 7401-7671q. Section 113(a) of the Act requires the Administrator of the United States Environmental Protection Agency ("EPA") to notify any person in violation of a state implementation plan or permit of the violations. The authority to issue this NOV has been delegated to the

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Regional Administrator of EPA Region 4 and further redelegated to the Director, Air, Pesticides and Toxics Management Division, EPA, Region 4.

#### STATUTORY AND REGULATORY BACKGROUND

1. When the Act was passed in 1970, Congress exempted existing facilities, including the coal-fired power plants that are the subject of this Notice, from many of its requirements. However, Congress also made it quite clear that this exemption would not last forever. As the United States Court of Appeals for the D.C. Circuit explained in Alabama Power v. Costle, 636 F.2d 323 (D.C. Cir. 1979), "the statutory scheme intends to 'grandfather' existing industries; but...this is not to constitute a perpetual immunity from all standards under the PSD program." Rather, the Act requires grandfathered facilities to install modern pollution control devices whenever the unit is proposed to be modified in such a way that its emissions may increase.
2. The NSR provisions of Parts C and D of Title I of the Act require preconstruction review and permitting for modifications of stationary sources. Pursuant to applicable regulations, if a major stationary source is planning upon making a major modification, then that source must obtain either a PSD permit or a nonattainment NSR permit, depending on whether the source is located in an attainment or a nonattainment area for the pollutant being increased above the significance level. To obtain this permit, the source must agree to put on the best available control technology ("BACT") for an attainment pollutant or achieve the lowest achievable emission rate ("LAER") in a nonattainment area, or in the case of a modification that is not major, must meet the emission limit called for under the applicable minor NSR program.
3. Pursuant to the Act, the SIP of Georgia requires that no construction or operation of a modification of a major stationary source occur without first obtaining a NSR permit. See: for PSD permits in attainment areas, 40 C.F.R. § 52.21(i), and Section 7 of Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.02, which is part of the Georgia SIP that was approved by EPA on September 18, 1979, as amended on February 10, 1982 (47 Fed. Reg. 6017), December 14, 1992 (57 Fed. Reg. 58989) and February 2, 1996 (61 Fed. Reg. 3817); for NSR permits in nonattainment areas, Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.03, which is part of the Georgia SIP that was approved by EPA on September 18, 1979 (44 Fed. Reg. 54047) and amended on March 8, 1995 (60 Fed. Reg. 12688); for minor modifications regardless of attainment status, Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.03, which is part of the Georgia SIP that was approved by EPA on August 20, 1976 (41 Fed. Reg. 35184), and amended on September 18, 1979 (44 Fed. Reg. 54047) and on March 8, 1995 (60 Fed. Reg. 12688).

4. Pursuant to the Act, the SIP of Alabama requires that no construction or operation of a modification of a major stationary source occur without first obtaining a permit. See: for PSD permits in attainment areas, 40 C.F.R. § 52.21(i), and Alabama Department of Environmental Management Code 335-3-14-.04(8), which is part of the Alabama SIP that was approved by EPA on March 9, 1983 (48 Fed. Reg. 9860); for NSR permits in nonattainment areas, Alabama Department of Environmental Management Code 335-3-14-.05, which is part of the Alabama SIP that was approved by EPA on November 10, 1981 (46 Fed. Reg. 55518), as amended on December 28, 1987 (52 Fed. Reg. 48812); and for minor modifications regardless of attainment status, Alabama Department of Environmental Management Code 335-3-14-.01, which is part of the Alabama SIP that was approved by EPA on November 10, 1981 (46 Fed. Reg. 55518), as amended on December 28, 1987 (52 Fed. Reg. 48812).
5. Pursuant to the Act, the SIP of Mississippi requires that no construction or operation of a modification of a major stationary source occur without first obtaining a permit. See: for PSD permits in attainment areas, 40 C.F.R. § 52.21(i), and Mississippi Commission on Natural Resources regulation APC-S-5, which is part of the Mississippi SIP that was approved by EPA on October 15, 1990 (55 Fed. Reg. 41692), and amended on June 14, 1992 (57 Fed. Reg. 34252), on May 5, 1995 (60 Fed. Reg. 22287), and July 15, 1997 (62 Fed. Reg. 37724); for NSR permits in nonattainment areas, Mississippi Commission on Natural Resources regulation APC-S-2, Section IV, which is part of the Mississippi SIP that was approved by EPA on February 4, 1972 (37 Fed. Reg. 10875), as amended on September 15, 1994 (59 Fed. Reg. 47258) and on May 2, 1995 (60 Fed. Reg. 21442); and for minor modifications regardless of attainment status, Mississippi Commission on Natural Resources regulation APC-S-2, Sections III and IV, which are part of the Mississippi SIP that was approved by EPA on February 4, 1972 (37 Fed. Reg. 10875), as amended on September 15, 1994 (59 Fed. Reg. 47258) and on May 2, 1995 (60 Fed. Reg. 21442).
6. Pursuant to the Act, the SIP of Florida requires that no construction or operation of a modification of a major stationary source without first obtaining a permit. See: for PSD permits in attainment areas, 40 C.F.R. § 52.21(i), and the current Florida SIP Rule 62-212.400, Florida Administrative Code (F.A.C.), which is part of the Florida SIP that was approved by EPA on November 22, 1983 (48 Fed. Reg. 52716), and amended on October 20, 1994 (59 Fed. Reg. 52916), and on January 11, 1995 (60 Fed. Reg. 2688); for NSR permits in nonattainment areas, 40 C.F.R. § 52.24(a), and Florida SIP Rule 62-212.500, F.A.C., which was approved by EPA on November 22, 1983 (48 Fed. Reg. 52716), and amended on October 20, 1994 (59 Fed. Reg. 52916); and for minor NSR permits regardless of attainment status, 62-212.300, F.A.C., which is part of the Florida SIP that was approved by EPA on October 20, 1994 (59 Fed. Reg. 52916). No SIP-approval for PSD has been given to the State of Florida for power plants which are also subject to the Florida Power Plant Siting Act

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(PPSA). Rather, Florida has a fully delegated PSD program with respect to power plants subject to the PPSA. Florida implements this delegation under 40 C.F.R. Section 52.21, whose provisions are incorporated by reference into the Florida SIP pursuant to 40 C.F.R. Section 52.530.

7. The SIP provisions identified in paragraphs 3-7 above are all federally enforceable pursuant to Sections 110 and 113 of the Act.

#### FACTUAL BACKGROUND

8. The Southern Companies are owners and/or operators of the facilities that are the subject of this NOV.
9. Southern and Georgia Power Company operate the Scherer Plant, a fossil fuel-fired electric utility steam generating plant located at 10986 Highway 87, Monroe County, Juliette, Georgia, 31046. The plant consists of 4 boiler units with up to 269,810,000 mmBTU annual heat input, and began operations in 1982.
10. Southern and Georgia Power Company operate the Bowen Plant, a fossil fuel-fired electric utility steam generating plant located at 317 Covered Bridge Road, Bartow County, Cartersville, Georgia, 30120. The plant consists of 4 boiler units with 207,281,000 mmBTU annual heat input in 1998, and began operations in 1972.
11. Southern and Savannah Power Company operate the Kraft Plant, a fossil fuel-fired electric utility steam generating plant located at P.O. Box 4068, Chatham County, Port Wentworth, Georgia, 31407. The plant consists of 4 boiler units, with 7,630,000 mmBTU annual heat input in 1997, and began operations in 1972.
12. The Scherer, Bowen and Kraft Plants are located in areas that have the following attainment/nonattainment classifications from 1979 to the present:
  - For NO<sub>2</sub>, the areas have been classified attainment or unclassifiable;
  - For SO<sub>2</sub>, the areas have been classified attainment or unclassifiable;
  - For PM, the areas have been classified attainment or unclassifiable;
  - For Ozone, the areas have been classified attainment or unclassifiable.
13. Southern and Alabama Power Company operate the Gorgas Steam Plant, a fossil fuel-fired electric utility steam generating plant located at 460 Gorgas Road, Walker County, Parrish, Alabama, 35580. The plant consists

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of 5 boiler units (Nos. 6-10) with 89,621,000 mmBTU annual heat input in 1997, and began operations in 1972.

14. Southern and Alabama Power Company operate the Greene County Plant, a fossil fuel-fired electric utility steam generating plant located at Highway 83 and County Road 18, Greene County, Forkland, Alabama, 36732. The plant consists of 2 boiler units with 34,249,000 mmBTU annual heat input in 1997, and began operations in 1966.
15. The Gorgas and Green County Plants are located in areas that have the following attainment/nonattainment classifications from 1980 to the present:
  - For NO<sub>2</sub>, the areas have been classified attainment or unclassifiable;
  - For SO<sub>2</sub>, the areas have been classified attainment or unclassifiable;
  - For PM, the areas have been classified attainment or unclassifiable.
  - For Ozone, the areas have been classified attainment or unclassifiable.
16. Southern and Alabama Power Company operate the Barry Steam Plant, a fossil fuel-fired electric utility steam generating plant located at P.O. Box 70, Mobile County, Bucks, Alabama, 36512. The plant consists of 5 boiler units with 119,483,000 mmBTU annual heat input in 1997, and began operations in 1971.
17. The Barry Steam Plant is located in an area that has the following attainment/nonattainment classifications from 1980 to the present:
  - For SO<sub>2</sub> and NO<sub>2</sub>, the area has been classified attainment or unclassifiable;
  - For, Ozone, the area has been classified nonattainment until June 12, 1987 and attainment since that time; and
  - For TSP, the area has been classified nonattainment until November 15, 1984, and attainment since that time.
18. Southern and Alabama Power Company operate the Gaston Steam Plant, a fossil fuel-fired electric utility steam generating plant located at P.O. Box 1127, Shelby County, Wilsonville, Alabama, 35186. The plant consists of 5 boiler units with 111,239,000 mmBTU annual heat input in 1997, and began operations in 1974.
19. The Gaston Steam Plant is located in an area that has the following attainment/nonattainment classifications from 1980 to the present:
  - For NO<sub>2</sub>, the area has been classified attainment or unclassifiable;

For SO<sub>2</sub>, the area has been classified attainment or unclassifiable;

For PM, the area has been classified attainment or unclassifiable.  
For Ozone, the area has been classified attainment

20. Southern and Alabama Power Company operate the Miller Plant, a fossil fuel-fired electric utility steam generating plant located at 42050 Porter Road, Jefferson County, Quinton, Alabama, 35130. The plant consists of 4 boiler units with 204,211,519 mmBTU annual heat input in 1998, and began operations in 1978.
21. The Miller Plant is located in an area that has the following attainment/nonattainment classifications from 1980 to the present:
  - For NO<sub>2</sub>, the area has been classified attainment or unclassifiable;
  - For SO<sub>2</sub>, the area has been classified attainment or unclassifiable;
  - For PM, the area has been classified attainment or unclassifiable.
  - For Ozone, the area has been classified attainment or unclassifiable.
22. Southern and Mississippi Power Company operate the Watson Electric Generating Plant, a fossil fuel-fired electric utility steam generating plant located at P.O. Box 4079, Harrison County, Gulfport, Mississippi, 39502. The plant consists of 2 boiler units (Nos. 4-5) with 46,831,000 mmBTU annual heat input in 1997, and began operations in 1973.
23. The Watson Plant is located in an area that has the following attainment/nonattainment classifications from 1980 to the present:
  - For NO<sub>2</sub>, the area has been classified attainment or unclassifiable;
  - For SO<sub>2</sub>, the area has been classified attainment or unclassifiable;
  - For PM, the area has been classified attainment or unclassifiable.
  - For Ozone, the area has been classified attainment.
24. Southern and Gulf Power Company operate the Crist Plant, a fossil fuel-fired electric utility steam generating plant located at One Energy Place, Escambia County, Pensacola, Florida, 32520. The plant consists of 4 boiler units (Nos. 4-7) with 44,407,000 mmBTU annual heat input in 1997, and began operations in 1973.
25. The Crist Plant is located in an area that has the following attainment/nonattainment classifications from 1980 to the present:
  - For NO<sub>2</sub>, the area has been classified attainment or unclassifiable;

For SO<sub>2</sub>, the area has been classified attainment or unclassifiable;

For PM, the area has been classified attainment or unclassifiable.  
For ozone, the area has been classified attainment.

26. Each of the plants identified in paragraphs 9 through 25 above emits or has the potential to emit at least 100 tons per year of NO<sub>x</sub>, SO<sub>2</sub> and/or PM and is a major stationary source under the Act.

#### VIOLATIONS

##### Georgia Power Plants

##### A. Scherer Plant

27. In 1979, the Southern and Georgia Power Company "commenced construction" as that term is defined in the 1974 EPA PSD regulations, 40 C.F.R. § 51.21(b), and the Georgia SIP, Section 7 of Georgia Department of Natural Resources Air Quality Control Rule Chapter 391-3-1-.02, on the Scherer Plant in Juliette, Georgia. Construction on Units 3 and 4 was not completed until 1987 and 1989, respectively.
28. For each of these new source constructions that occurred at the Scherer Plant, neither Southern nor Georgia Power obtained a PSD permit pursuant to Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.02(7) nor a minor NSR permit pursuant to Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.03.
29. None of this new source construction falls within the exemptions found at 40 C.F.R. § 52.21(i), because neither Southern nor Georgia Power ever obtained a PSD permit under the 1974 EPA PSD regulations, and the work was not completed in a reasonable time.
30. Each of these new source constructions resulted in a net significant increase in emissions, as that term is defined in 40 C.F.R. § 52.21(b), and Section 7 of Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.02, for NO<sub>x</sub>, SO<sub>2</sub> and/or PM from Units 3 and 4 of the Scherer Plant.
31. Therefore, Southern and Georgia Power violated and continue to violate the Georgia SIP by constructing and operating the Scherer Plant without the necessary permit required by EPA and the Georgia SIP.
32. Each of these violations exists from the date of start of construction of Units 3 and 4, respectively, until the time that the Southern Company and Georgia Power obtain the appropriate NSR permit and operate the necessary pollution control equipment to satisfy the Georgia SIP.

B. Bowen Plant

33. On numerous occasions between 1979 and the date of this Notice, Southern and Georgia Power have made "modifications" to the Bowen Plant as defined by the Georgia SIP, Section 7 of Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.02. These modifications include the replacement and redesign of the economizer for Unit 2 in 1992.
34. For each of the modifications that occurred at the Bowen Plant, neither Southern nor Georgia Power obtained a PSD permit pursuant to Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.02(7), nor a minor NSR permit pursuant to Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.03. In addition, for modifications after 1992, no information was provided to the permitting agency of actual emissions after the modification as required by Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.02(7).
35. None of these modifications fall within the "routine maintenance, repair and replacement" exemption found at 40 C.F.R. § 52.21(b)(2)(iii)(a), or Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.02(7). Each of these changes was an expensive capital expenditure performed infrequently at the plant that constituted the replacement and/or redesign of a boiler component with a long useful life. In each instance, the change was performed to increase capacity, regain lost capacity, and/or extend the life of the unit. In many instances, the original component was replaced with a component that was substantially redesigned in a manner that increased emissions. That the "routine maintenance, repair and replacement" exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7<sup>th</sup> Cir. 1990).
36. None of these modifications fall within the "increase in hours of operation or in the production rate" exemption found at 40 C.F.R. § 52.21(b)(2)(iii)(f), or Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.02(7). This exemption is limited to stand-alone increases in operating hours or production rates, not where such increases follow or are otherwise linked to construction activity. That the hours of operation/rates of production exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld twice by the court of appeals, in 1989 and

in 1990. Puerto Rican Cement Co. v. EPA, 889 F.2d 292 (1<sup>st</sup> Cir. 1989); Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7<sup>th</sup> Cir. 1990).

37. None of these modifications fall within the "demand growth" exemption found at Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.02(7), because for each modification a physical change was performed which resulted in the emissions increase.
38. Each of these modifications resulted in a net significant increase in emissions, as that term is defined at Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.02(7) from the Bowen Plant for NO<sub>x</sub>, SO<sub>2</sub> and/or PM.
39. Therefore, Southern and Georgia Power violated and continue to violate the Georgia SIP by constructing and operating modifications at the Bowen Plant without the necessary permit required by the Georgia SIP.
40. Each of these violations exists from the date of start of construction of the modification until the time that Southern and Georgia Power obtain the appropriate NSR permit and operate the necessary pollution control equipment to satisfy the Georgia SIP.

#### Alabama Power Plants

##### C. Miller Plant

41. In 1979, Southern and Alabama Power "commenced construction" as that term is defined in the 1974 EPA PSD regulations, 40 C.F.R. § 51.21(b), and the Alabama SIP, ADEM Code 335-3-14-.04, on the Miller Plant in Quinton, Alabama. Construction on Units 3 and 4 was not completed until 1989 and 1991, respectively.
42. For each of the new source constructions that occurred at the Miller Plant, neither Southern nor Alabama Power obtained a PSD permit pursuant to ADEM Code 335-3-14-.04, a nonattainment NSR permit pursuant to ADEM Code 335-3-14-.05, nor a minor NSR permit pursuant to ADEM Code 335-3-14-.01.
43. None of this new source construction falls within the exemptions found at 40 C.F.R. § 52.21(i), because neither Southern nor Alabama Power ever obtained a PSD permit under the 1974 or 1978 EPA PSD regulations, and the work was not completed in a reasonable time.
44. Each of these new source constructions resulted in a net significant increase in emissions, as that term is defined in 40 C.F.R. § 52.21(b), and ADEM Code 335-3-14-.04(2), for NO<sub>x</sub>, SO<sub>2</sub> and/or PM from Units 3 and 4 of the Miller Plant.

45. Therefore, Southern and Alabama Power violated and continue to violate the Alabama SIP by constructing and operating the Miller Plant without the necessary permit required by EPA and the Alabama SIP.
46. Each of these violations exists from the date of start of construction of Units 3 and 4, respectively, until the time that Southern and Alabama Power obtain the appropriate NSR permit and operate the necessary pollution control equipment to satisfy the Alabama SIP.

D. Barry, Gorgas, Gaston and Greene County Plants

47. On numerous occasions between 1979 and the date of this Notice, Southern and Alabama Power have made "modifications" of the Barry Plant as defined by the Alabama SIP, Alabama Department of Environmental Management (ADEM) Code 335-3-14-.04(2)(b)(1). These modifications include the installation of a new economizer on Unit 5 in 1993.
48. For each of the modifications that occurred at the Barry Plant, neither Southern nor Alabama Power obtained a PSD permit pursuant to ADEM Code 335-3-14-.04, a nonattainment NSR permit pursuant to ADEM Code 335-3-14-.05, nor a minor NSR permit pursuant to ADEM Rule 335-3-14-.01. In addition, no information was provided to the permitting agency of actual emissions after a modification as required by ADEM Code 335-3-14-.03.
49. On numerous occasions between 1979 and the date of this Notice, Southern and Alabama Power have made "modifications" of the Gorgas Plant as defined by the Alabama SIP, ADEM Code 335-3-14-.04(2)(b)(1). These modifications included, but are not limited to, the balanced draft conversion of Unit 10 in 1985, the installation of a new economizer on Unit 10 in 1994, and installation of redesigned air heaters on Unit 10 in 1994.
50. For each of these modifications that occurred at the Gorgas Plant, neither Southern nor Alabama Power obtained a PSD permit pursuant to ADEM Code 335-3-14-.04, a nonattainment NSR permit pursuant to ADEM Code 335-3-14-.05, nor a minor NSR permit pursuant to ADEM Rule 335-3-14-.01. In addition, for modifications after 1992, no documentation was provided to the permitting agency of actual emissions after the modification as required by ADEM Code 335-3-14-.03.
51. On numerous occasions between 1979 and the date of this Notice, Southern and Alabama Power have made "modifications" of the Gaston Plant as defined by the Alabama SIP, ADEM Code 335-3-14-.04(2)(b)(1). These modifications include the replacement of the front reheater for Unit 5 in 1991.
52. For each of the modifications that occurred at the Gaston Plant, neither the Southern Company nor Alabama Power obtained a PSD permit pursuant to ADEM Code 335-3-14-.04, a nonattainment NSR permit pursuant to ADEM Code

335-3-14-.05, nor a minor NSR permit pursuant to ADEM Rule 335-3-14-.01. In addition, for modifications after 1992, no documentation was provided to the permitting agency of actual emission after the modification as required by ADEM Code 335-3-14-.03.

53. On numerous occasions between 1979 and the date of this Notice, Southern and Alabama Power have made "modifications" of the Greene County Plant as defined by the Alabama SIP, ADEM Code 335-3-14-.04(2)(b)(1). These modifications include the replacement of the primary reheater for Unit 2 in 1989.
54. For each of the modifications that occurred at the Greene Plant, neither Southern nor Alabama Power obtained a PSD permit pursuant to ADEM Code 335-3-14-.04, a nonattainment NSR permit pursuant to ADEM Code 335-3-14-.05, nor a minor NSR permit pursuant to ADEM Rule 335-3-14-.01. In addition, for modifications after 1992, no information was provided to the permitting agency of actual emissions after the modification as required by ADEM Code 335-3-14-.03.
55. The modifications at the Barry, Gorgas, Gaston, and Greene County plants do not fall within the "routine maintenance, repair and replacement" exemption found at 40 C.F.R. § 52.21(b)(2)(iii)(a), or ADEM Code 391-3-14-.04(8). Each of these changes was an expensive capital expenditure performed infrequently at the plant that constituted the replacement and/or redesign of a boiler component with a long useful life. In each instance, the change was performed to increase capacity, regain lost capacity, and/or extend the life of the unit. In many instances, the original component was replaced with a component that was substantially redesigned in a manner that increased emissions. That the "routine maintenance, repair and replacement" exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7<sup>th</sup> Cir. 1990).
56. None of these modifications fall within the "increase in hours of operation or in the production rate" exemption found at 40 C.F.R. § 52.21(b)(2)(iii)(f), or ADEM Code 391-3-14-.04(8). This exemption is limited to stand-alone increases in operating hours or production rates, not where such increases follow or are otherwise linked to construction activity. That the hours of operation/rates of production exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld twice by the court of appeals, in 1989 and

in 1990. Puerto Rican Cement Co. v. EPA, 889 F.2d 292 (1<sup>st</sup> Cir. 1989); Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7<sup>th</sup> Cir. 1990).

57. Each of the modifications at the Barry, Gorgas, Gaston, and Greene County plants resulted in a net significant increase in emissions, as that term is defined in ADEM Code 335-3-14-.04(2) (w), for NO<sub>x</sub>, SO<sub>2</sub> and/or PM.
58. Therefore, Southern and Alabama Power violated and continue to violate the Alabama SIP by constructing and operating modifications at the Barry, Gorgas, Gaston, and Greene County Plants without the necessary permit required by EPA and by the Alabama SIP.
59. Each of these violations exists from the date of start of construction of the modification until the time that Southern and Alabama Power obtain the appropriate NSR permit and operate the necessary pollution control equipment to satisfy EPA and the Alabama SIP.

#### E. Watson Plant

60. On numerous occasions between 1979 and the date of this Notice, Southern and Mississippi Power Company have made "modifications" of the Watson Plant as defined by the Mississippi SIP, Mississippi Commission on Natural Resources regulation APC-S-2, Section I. These modifications include the replacement of the economizer at Unit 5 in 1992.
61. For each of the modifications that occurred at the Watson Plant, neither Southern nor Mississippi Power obtained a PSD permit pursuant to Mississippi Commission on Natural Resources regulation APC-S-2, Section IV, a nonattainment NSR permit pursuant to Mississippi Commission on Natural Resources regulation APC-S-2, Section IV, nor a minor permit pursuant to Mississippi Commission on Natural Resources regulation APC-S-2, Section III.
62. None of these modifications fall within the "routine maintenance, repair and replacement" exemption found at 40 C.F.R. § 52.21(b)(2)(iii)(a), or Mississippi Commission on Natural Resources regulation APC-S-2, Section I. Each of these changes was an expensive capital expenditure performed infrequently at the plant that constituted the replacement and/or redesign of a boiler component with a long useful life. In each instance, the change was performed to increase capacity, regain lost capacity, and/or extend the life of the unit. In many instances, the original component was replaced with a component that was substantially redesigned in a manner that increased emissions. That the "routine maintenance, repair and replacement" exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption

was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7<sup>th</sup> Cir. 1990).

63. None of these modifications fall within the "increase in hours of operation or in the production rate" exemption found at 40 C.F.R. § 52.21(b) (2) (iii) (f), or Mississippi Commission on Natural Resources regulation APC-S-2, Section I. This exemption is limited to stand-alone increases in operating hours or production rates, not where such increases follow or are otherwise linked to construction activity. That the hours of operation/rates of production exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld twice by the court of appeals, in 1989 and in 1990. Puerto Rican Cement Co. v. EPA, 889 F.2d 292 (1<sup>st</sup> Cir. 1989); Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7<sup>th</sup> Cir. 1990).
64. Each of these modifications resulted in a net significant increase in emissions, as that term is defined in Mississippi Commission on Natural Resources regulation APC-S-2, Section I, from the Watson Plant for NO<sub>x</sub>, SO<sub>2</sub> and/or PM.
65. Therefore, Southern and Mississippi Power violated and continue to violate the Mississippi SIP by constructing and operating modifications at the Watson Plant without the necessary permit required by EPA and the Mississippi SIP.
66. Each of these violations exists from the date of start of construction of the modification until the time that Southern and Mississippi Power obtain the appropriate NSR permit and operate the necessary pollution control equipment to satisfy EPA and the Mississippi SIP.

#### F. Crist Plant

67. On numerous occasions between 1979 and the date of this Notice, Southern and Gulf Power Company have made "modifications" at the Crist Plant as defined by both the EPA PSD Regulations, 40 C.F.R. Part 51, Section 52.21(b), and Florida SIP Rule 62-212.400, F.A.C. These modifications include the replacement of the economizer at Unit 7 in 1996.
68. For each of the modifications that occurred at the Crist Plant, neither Southern nor Gulf Power obtained a PSD permit pursuant to 40 C.F.R. § 52.21 and Florida regulation 62-212.400, F.A.C., a nonattainment NSR permit pursuant to 40 C.F.R. § 52.24 and Florida regulation 62-212.500, F.A.C., nor a minor source permit pursuant to the Florida SIP, regulation 62-212.300, F.A.C. In addition, for modifications after 1992, no information was provided to the permitting agency of actual

emissions after the modification as required by 40 C.F.R. § 52.21(b) (21) (v).

69. None of these modifications fall within the "routine maintenance, repair and replacement" exemption found at 40 C.F.R. § 51.21(b) (2) (iii) (a), or Florida regulation 62-210.200(183) (a) 1a, F.A.C. Each of these changes was an expensive capital expenditure performed infrequently at the plant that constituted the replacement and/or redesign of a boiler component with a long useful life. In each instance, the change was performed to increase capacity, regain lost capacity, and/or extend the life of the unit. In many instances, the original component was replaced with a component that was substantially redesigned in a manner that increased emissions. That the "routine maintenance, repair and replacement" exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7<sup>th</sup> Cir. 1990).
70. None of these modifications fall within the "increase in hours of operation or in the production rate" exemption found at 40 C.F.R. § 52.21(b) (2) (iii) (f), or Florida regulation 62-210.200(183) (a) 1a, F.A.C. This exemption is limited to stand-alone increases in operating hours or production rates, not where such increases follow or are otherwise linked to construction activity. That the hours of operation/rates of production exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld twice by the court of appeals, in 1989 and in 1990. Puerto Rican Cement Co. v. EPA, 889 F.2d 292 (1<sup>st</sup> Cir. 1989); Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7<sup>th</sup> Cir. 1990).
71. None of these modifications fall within the "demand growth" exemption found at 40 C.F.R. § 52.21(b), because for each modification a physical change was performed which resulted in the emissions increase.
72. Each of these modifications resulted in a net significant increase in emissions, as that term is defined in 40 C.F.R. § 51.21(b), from the Crist Plant for NO<sub>x</sub>, SO<sub>2</sub> and/or PM.
73. Therefore, Southern and Gulf Power violated and continue to violate the Florida SIP by constructing and operating modifications at the Crist Plant without the necessary permit required by the EPA PSD regulations and the Florida SIP.

EPA40RC001892

74. Each of these violations exists from the date of start of construction of the modification until the time that Southern and Gulf Power obtain the appropriate NSR permit and operate the necessary pollution control equipment to satisfy the EPA PSD regulations and the Florida SIP.

M. Plant Kraft

75. On numerous occasions between 1979 and the date of this Notice, Southern and Savannah Power Company have made "modifications" at the Kraft Plant as defined by the Georgia SIP, Section 7 of Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.02. These modifications include the balanced draft conversion of Unit 3 in 1985.
76. For each of the modifications that occurred at the Kraft Plant, neither Southern nor Savannah Power obtained a PSD permit pursuant to Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.02(7), a nonattainment NSR permit pursuant to Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.03, nor a minor NSR permit pursuant to Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.03. In addition, for modifications after 1992, no information was provided to the permitting agency of actual emissions after the modification as required by Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.02(7).
77. None of these modifications fall within the "routine maintenance, repair and replacement" exemption found at 40 C.F.R. § 52.21(b)(2)(iii)(a), or Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.02(7). Each of these changes was an expensive capital expenditure performed infrequently at the plant that constituted the replacement and/or redesign of a boiler component with a long useful life. In each instance, the change was performed to increase capacity, regain lost capacity, and/or extend the life of the unit. In many instances, the original component was replaced with a component that was substantially redesigned in a manner that increased emissions. That the "routine maintenance, repair and replacement" exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7<sup>th</sup> Cir. 1990).
78. None of these modifications fall within the "increase in hours of operation or in the production rate" exemption found at 40 C.F.R. § 52.21(b)(2)(iii)(f), or Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.02(7). This exemption is limited to stand-alone increases in operating hours or production rates, not where such increases follow or are otherwise linked to construction activity. That the hours of operation/rates of production exemption does not apply

where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld twice by the court of appeals, in 1989 and in 1990. Puerto Rican Cement Co. v. EPA, 889 F.2d 292 (1<sup>st</sup> Cir. 1989); Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7<sup>th</sup> Cir. 1990).

79. None of these modifications fall within the "demand growth" exemption found at Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.02(7), because for each modification a physical change was performed which resulted in the emissions increase.
80. Each of these modifications resulted in a net significant increase in emissions, as that term is defined within Georgia Department of Natural Resources Air Quality Control Rule 391-3-1-.02(7), from the Kraft Plant for NOx, SO<sub>2</sub> and/or PM.
81. Therefore, Southern and Savannah Power violated and continue to violate the Georgia SIP by constructing and operating modifications at the Kraft Plant without the necessary permit required by the Georgia SIP.
82. Each of these violations exists from the date of start of construction of the modification until the time that Southern and Savannah Power obtain the appropriate NSR permit and operate the necessary pollution control equipment to satisfy the Georgia SIP.

#### ENFORCEMENT

Section 113(a)(1) of the Act provides that at any time after the expiration of 30 days following the date of the issuance of this NOV, the Regional Administrator may, without regard to the period of violation, issue an order requiring compliance with the requirements of the state implementation plan or permit, and/or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties of not more than \$25,000 per day for each violation on or before January 30, 1997, and no more than \$27,500 per day for each violation after January 30, 1997.

#### OPPORTUNITY FOR CONFERENCE

Respondents may, upon request, confer with EPA. The conference will enable Respondents to present evidence bearing on the finding of violation, on the nature of violation, and on any efforts it may have taken or proposes to take to achieve compliance. Respondents have the right to be represented by counsel. A request for a conference must be made within 10 days of receipt of this NOV, and the request for a conference or other inquiries concerning the NOV should be made in writing to:

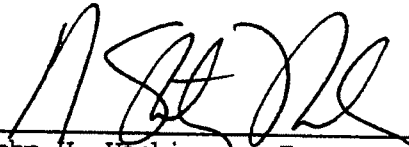
Charles V. Mikalian  
Associate Regional Counsel  
Environmental Accountability Division  
U.S. EPA - Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303  
404-562-9575

By offering the opportunity for a conference or participating in one, EPA does not waive or limit its right to any remedy available under the Act.

Effective Date

This NOV shall become effective immediately upon issuance.

11/2/99  
Date

  
\_\_\_\_\_  
John H. Hankinson, Jr.  
Regional Administrator  
EPA, Region 4



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

JAN 24 1993

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mr. Roy Palk, President  
East Kentucky Power Cooperative  
4775 Lexington Road  
PO Box 707  
Winchester, KY 40392-0707

Dear Mr. Palk:

Enclosed is a Notice of Violation ("NOV") issued to the East Kentucky Power Cooperative ("East Kentucky") under Section 113(a)(1) of the Clean Air Act, 42 U.S.C. § 7413(a)(1). In the NOV, the United States Environmental Protection Agency notifies East Kentucky of violations of pre-construction and operating permitting requirements of the Clean Air Act and the Kentucky State Implementation Plan at the Spurlock plant.

Please note the opportunity to confer outlined in the NOV. As indicated in the NOV, any request to confer should be directed to Charles V. Mikalian. Mr. Mikalian can be reached at (404) 562-9575.

Sincerely,

A handwritten signature in cursive script that reads "Douglas Neely for".

Beverly H. Banister  
Director  
Air, Pesticides and Toxics  
Management Division

cc: John M. Holloway, Hunton & Williams  
John Lyons, KDAQ

Enclosures

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF: )  
 )  
EAST KENTUCKY POWER ) **Notice of Violation**  
COOPERATIVE )  
 )  
Proceedings Pursuant to ) **EPA-CAA-04-2003-01**  
Section 113 and 167 of the )  
Clean Air Act, 42 U.S.C. )  
§7413, 7467 )  
\_\_\_\_\_ )

**NOTICE OF VIOLATION**

This Notice of Violation ("Notice") is issued to the East Kentucky Power Cooperative ("East Kentucky") for violations of the Clean Air Act ("the CAA") at its Spurlock coal-fired power plant. Specifically, East Kentucky has violated Title I of the Clean Air Act by failing to comply with Prevention of Significant Deterioration requirements of the CAA and the Kentucky State Implementation Plan. East Kentucky has also violated Title V of the CAA by (1) failing in its Title V permit application to identify all applicable requirements and to propose a compliance schedule and (2) certifying that it was in compliance with the above-listed requirements. This Notice is issued pursuant to Section 113 of the Act, as amended, 42 U.S.C.A. Section 7401-7671q. The authority to issue this Notice has been delegated to the Regional Administrator of the United States Environmental Protection Agency ("U.S. EPA," "EPA," "the Agency") Region 4 and further re-delegated to the Director, Air, Pesticides and Toxics Management Division, U.S. EPA, Region 4.

**SUMMARY OF VIOLATION(S)**

In January, 1976, East Kentucky submitted a construction permit application for a new steam electric generating unit identified as "Spurlock Unit 2" with a maximum heat input of 4850 million Btu<sup>1</sup> per hour. This application also indicated that 100 percent of the steam generated at the facility would be used in the generation of electricity. [**Attachment 1**]

In September, 1976, based on a federal PSD application submitted by East Kentucky, the United States Environmental Protection Agency ("EPA") granted approval to construct Spurlock Unit 2, a "major stationary source" under the CAA. [**Attachments 1B and 1C**]

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<sup>1</sup> A Btu or "British thermal unit" is a measurement of energy or heat. It is the amount of energy needed to raise the temperature of one pound of water by one degree Fahrenheit. "MMBtu" is one million Btu or the amount of energy needed to raise the temperature of one million pounds of water by one degree Fahrenheit.

Upon completion of construction, East Kentucky was issued a federally enforceable operating permit on November 10, 1982 that contained, inter alia, a permit condition that limited maximum hourly heat input to the Spurlock Unit 2 to 4850 MMBTU/hr. [Attachment 2] East Kentucky has thereafter been the owner and/or operator of the Spurlock Plant.

The Spurlock Plant is located in an area that has at all relevant times been classified as attainment or unclassifiable for NO<sub>2</sub>, SO<sub>2</sub>, PM and ozone. Accordingly, the Prevention of Significant Deterioration ("PSD") provisions of Part C, Title I of the Clean Air Act ("CAA") apply to operations at the Spurlock plant.

In August, 1992, East Kentucky began supplying steam from Spurlock Unit 2 to the Inland Container Corp. for use in Inland's manufacturing operations. This activity was contrary to the representations in the 1976 construction permit application for Spurlock Unit 2 that all of the steam generated at Unit 2 would be used to generate electricity. The PSD regulations provide that operation of a source "not in accordance" with its PSD permit application is a violation that subjects the operator to an enforcement action. See 40 C.F.R. 52.21(r)(1).

In December, 1993, East Kentucky sought an increase in the permitted maximum hourly heat input to the boiler from 4850 MMBTU/hr to 5355 MMBTU/hr, which is, in effect, a request for an increase in the boiler's hourly emission rates. In February, 1994, the Kentucky Department of Air Quality ("the Department") responded to this request by advising East Kentucky that such an increase would be considered a major modification under the PSD rules and be subject to PSD permitting requirements if it resulted in a significant net emissions increase. In December, 1994, the Department sent East Kentucky a follow-up letter reminding East Kentucky of the applicable requirements. In January, 1995, East Kentucky stated that it "was reviewing the operating status of [its] units" and withdrew its request for an increase in maximum operating heat rate for Spurlock Unit 2. [Attachments 3 - 6] Thereafter, East Kentucky regularly exceeded the operating heat rate for Spurlock Unit 2.

In 1997, East Kentucky replaced the high pressure turbine with a turbine of a new design that could receive significantly more steam and increased the peak generation of the unit from 508 to 585 megawatts. Based on information available to it and to EPA, East Kentucky anticipated, and experienced, an increase in utilization of the boiler and should have projected a net emissions increase from the boiler well above the "significance levels" established in the CAA for one or more regulated pollutants. This increase in steam demand also resulted in more frequent and greater exceedances of the limitation on maximum operating heat rate for Spurlock Unit 2.

These activities constituted violations of Spurlock Unit 2's operating permit and operation inconsistent with the PSD permit application for the Unit, each of which is a violation of the applicable PSD regulations. See 40 C.F.R. 52.21(r)(1). Additionally, East Kentucky's regular operation in excess of the permitted maximum heat rate is a "physical change or change in the method of operation" that is not exempted from the PSD regulations' definition of "major

modification.” because such an increase is prohibited by East Kentucky’s federally enforceable operating permit. See 40 CFR 52.21(b)(2)(iii)(f). Since the data necessary to establish these violations was collected and maintained by East Kentucky, it appears that East Kentucky was aware of the violations.

On December 10, 1996, East Kentucky applied for a Title V permit for the Spurlock Plant. In the course of obtaining its Title V permit, East Kentucky again commented that the maximum continuous rating for Unit 2 should be increased, this time to 5600 MMBtu/hr. In its response to East Kentucky’s comments, the Division again responded that this limitation could not be increased until compliance with applicable PSD requirements were demonstrated. [Attachment 7] However, in the final Title V permit that was issued on December 10, 1999, the 4850 MMBtu/hr. maximum heat input limitation is replaced by a reference to a maximum continuous rating in the “Description” part of the permit and does not appear to be an enforceable condition of the permit. No terms or conditions are specified under “Operating Limitations.” [Attachment 8]

To the extent that this “Description” in East Kentucky’s Title V permit is intended to relax the earlier constraint, 40 C.F.R. 52.21 (r)(4) provides that, upon such relaxation of an enforceable limit, the PSD rules apply as if the source had not yet been constructed. To the extent that the Title V Permit is read as incorporating and retaining the prior limitation on heat input, East Kentucky has regularly violated the limitation, thereby triggering PSD requirements. Under either reading of the Title V permit, operation above 4850 MMBtu/hr remains a violation of the PSD rules pursuant to 40 C.F.R. 52.21(r)(1).

Under the applicable Kentucky Title V permit regulations East Kentucky was required to identify all applicable requirements, identify a compliance schedule for those applicable requirements for which the Spurlock plant was not already in compliance, and to certify its compliance.

With respect to the operation above 4850 MMBtu/hr at Spurlock Unit 2, East Kentucky never identified PSD as an applicable requirement, never proposed a schedule for complying with PSD and has failed to identify the noncompliance in its initial or annual certification(s).

These violations of the Act and the State Implementation Plan (“SIP”) of Kentucky have resulted in the release of massive quantities of SO<sub>2</sub>, NO<sub>x</sub>, and/or PM into the environment. [Attachments 9 - 12] Until these violations are corrected, the Spurlock Plant will continue to release massive quantities of illegal SO<sub>2</sub>, NO<sub>x</sub>, and/or PM into the environment.

## **RELEVANT STATUTORY AND REGULATORY BACKGROUND**

1. When the Act was passed in 1970, Congress exempted existing facilities, including the coal-fired power plant that is the subject of this NOV, from many of its requirements. However, in the 1977 CAA Amendments, Congress also made it quite clear that this

exemption would not last forever. As the United States Court of Appeals for the D.C. Circuit explained in Alabama Power v. Costle, 636 F.2d 323 (D.C. Cir. 1979), "the statutory scheme intends to 'grandfather' existing industries; but...this is not to constitute a perpetual immunity from all standards under the PSD program." Rather, the Act requires grandfathered facilities to install modern pollution control devices whenever the unit is proposed to be modified in such a way that its emissions may increase.

2. The PSD provisions require preconstruction review and permitting for modifications of stationary sources. Pursuant to applicable regulations, if a major stationary source located in an attainment area is planning to make a major modification, then that source must obtain a Prevention of Significant Deterioration ("PSD") permit. To obtain this permit, the source must agree to put on the best available control technology ("BACT") or in the case of a modification that is not major, must meet the emission limit called for under the applicable minor NSR program in the State SIP.
3. Pursuant to Part C of the Act, the SIP of Kentucky requires that no construction or operation of a major modification of a major stationary source occur in an area designated as attainment without first obtaining a permit. See: for PSD permits in attainment areas, Kentucky Administrative Regulation (KAR) 401 KAR 51:017, which was originally made approved as part of the Kentucky SIP on September 1, 1989, at 54 Fed. Reg. 36307, and since amended.
4. The Kentucky SIP provisions identified in paragraph 3 above are all federally enforceable pursuant to Sections 110 and 113 of the Act.
5. Pursuant to Section 502(a) of the Act, 42 U.S.C. § 7661(a), it is unlawful to operate without or in violation of a permit issued pursuant to subchapter V of the Act, 42 U.S.C. § 7661 *et. seq.*
6. Kentucky's program under subchapter V of the Act was granted interim approval by the Administrator on November 14, 1995, (60 Fed. Reg. 57186) and final approval on October 31, 2001, (66 Fed. Reg. 54953). These regulations are currently codified at 401 KAR 52.020. Pursuant to 401 KAR 52.020, Section (3)(1)(b), a source shall operate in compliance with a permit issued pursuant to that regulation.
7. Sections 4(1) and 5 of 401 KAR 52.020 require that a source submit a complete permit application which identifies all applicable requirements and information needed to determine applicable requirements for the source.
8. Section 5(8) of 401 KAR 52.020 requires that a permit application must contain a compliance plan for all applicable requirements for which the source is not in compliance.

9. Section 5(9) of 401 KAR 52.020 requires that a permit application must contain a certification of compliance with all applicable requirements.
10. Sections 21 and 23 of 401 KAR 52.020 require that a source submit compliance certifications annually.
11. Section 113(a)(1) of the Act provides that at any time after the expiration of 30 days following the date of the issuance of this NOV, the Administrator may, without regard to the period of violation, issue an order requiring compliance with the requirements of the state implementation plan or permit, and/or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties of not more than \$25,000 per day for each violation on or before January 30, 1997, and no more than \$27,500 per day for each violation after January 30, 1997. Sections 113(a)(1) and 113(b) also provide that the Administrator may take the same actions to enforce violations of subchapter V of the Act, 42 U.S.C. § 7661 et. seq.
12. Section 167 of the Act, 42 U.S.C. § 7477, authorizes the Administrator to initiate an action for injunctive relief as necessary to prevent the construction, modification or operation of a major emitting facility which does not conform to the PSD requirements.
13. As provided in Sections 113(a)(1), 113 (b) and 167 of the Act, 42 U.S.C. §§ 7413(a)(1), 7413(b) and 7477, the violations set forth above subject East Kentucky to injunctive relief and civil penalties.

### **OPPORTUNITY FOR CONFERENCE**

Respondent may, upon request, confer with EPA. The conference will enable Respondent to present evidence bearing on the finding of violation, on the nature of violation, and on any efforts it may have taken or proposes to take to achieve compliance. Respondent has the right to be represented by counsel. A request for a conference must be made within 10 days of receipt of this NOV, and the request for a conference or other inquiries concerning the NOV should be made in writing to:

Charles V. Mikalian  
Associate Regional Counsel  
Environmental Accountability Division  
U.S. EPA - Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303  
404-562-9575

By offering the opportunity for a conference or participating in one. EPA does not waive or limit its right to any remedy available under the Act.

#### EFFECTIVE DATE

This NOV shall become effective immediately upon issuance.

1/24/03  
Date

Douglas Neely for  
Beverly Banister  
Director  
Air, Pesticides, and Toxics  
Management Division



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

JUL 02 2003

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mr. Roy Palk, President  
East Kentucky Power Cooperative  
4775 Lexington Road  
PO Box 707  
Winchester, KY 40392-0707

SUBJ: Notice of Violation

Dear Mr. Palk:

Enclosed is a Notice of Violation (NOV) issued to the East Kentucky Power Cooperative (East Kentucky) under Section 113(a)(1) of the Clean Air Act, 42 U.S.C. § 7413(a)(1). In the NOV, the United States Environmental Protection Agency notifies East Kentucky of violations of pre-construction and operating permitting requirements of the Clean Air Act and the Kentucky State Implementation Plan at the Dale plant.

Please note the opportunity to confer outlined in the NOV. As indicated in the NOV, any request to confer should be directed to Alan E. Dion. Mr. Dion can be reached at (404) 562-9587.

Sincerely,

A handwritten signature in black ink, appearing to read "Beverly Bahister".

Beverly Bahister  
Director  
Air, Pesticides and Toxics  
Management Division

cc: John Holloway, Hunton & Williams  
John Lyons, KY Division for Air Quality

Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF:	)	
	)	
EAST KENTUCKY POWER	)	Notice of Violation
COOPERATIVE	)	
	)	
Proceedings Pursuant to	)	
Section 113 and 167 of the	)	
Clean Air Act, 42 U.S.C.	)	
§7413,7467	)	
_____	)	

**NOTICE OF VIOLATION**

This Notice of Violation ("NOV") is issued to the East Kentucky Power Cooperative ("East Kentucky") for violations of the Clean Air Act ("the CAA") at its Dale coal-fired power plant. Specifically, East Kentucky has violated Title I of the CAA by failing to comply with Prevention of Significant Deterioration (PSD) requirements and New Sources Performance Standards (NSPS) requirements of the CAA and with the Kentucky State Implementation Plan. East Kentucky has also violated Title V of the CAA by failing to address the PSD provisions of the CAA as applicable requirements in its Title V permit for the Dale plant. This NOV is issued pursuant to Section 113 of the Act, as amended, 42 U.S.C.A. Section 7401-7671q. The authority to issue this NOV has been delegated to the Regional Administrator of the United States Environment Protection Agency ("U.S. EPA," "EPA," "the Agency") Region 4 and further re-delegated to the Director, Air, Pesticides and Toxics Management Division, U.S. EPA, Region 4.

**SUMMARY OF VIOLATION(S)**

Unit 3 at the Dale plant began commercial service in 1957. Unit 4 began commercial service in 1960. As originally configured, both units had turbines rated at 66 megawatts. As a result of studies conducted in 1993 and 1994, East Kentucky decided to make major capital expenditures at the Dale plant in order to lengthen the life of that plant and to expand electrical production from that plant. In order to accomplish these goals, East Kentucky performed substantial work at both Dale Unit 3 and Dale Unit 4.

As originally configured, Dale Unit 4 was a forced-draft unit. In late 1994, East Kentucky converted Dale Unit 4 to a balanced-draft configuration. In 1994 and 1995, East Kentucky also replaced the 66 megawatt turbine at Dale Unit 4 with an 80 megawatt turbine. To make use of the increased capacity allowed by this new turbine, East Kentucky also performed substantial work on the Dale Unit 4 boiler, including but not limited to replacement or repair of coal feeders and process controls.

In 1996 and 1997, East Kentucky replaced the 66 megawatt turbine at Dale Unit 3 with an

80 megawatt turbine. To make use of the increased capacity allowed by this new turbine, East Kentucky also performed substantial work on the Dale Unit 3 boiler. This work included, but was not limited to, installation or repair of new pulverizers, process controls, feeders, fans, the preheater and the superheater.

Based on information available to it and to EPA, East Kentucky should have anticipated an increase in utilization of the Dale Unit 3 and 4 boilers that would result in increased emissions and should have projected a net emissions increase from those boilers well above the "significance levels" established in the CAA for one or more regulated pollutants. East Kentucky in fact experienced such emission increases.

The Dale Plant is located in an area that has at all relevant times been classified as attainment or unclassifiable for NO<sub>2</sub>, SO<sub>2</sub>, PM and ozone. Accordingly, the Prevention of Significant Deterioration ("PSD") provisions of Part C, Title I of the Clean Air Act ("CAA") apply to operations at the Dale plant. Nevertheless, East Kentucky failed to obtain a PSD permit for the activities at Dale Units 3 and 4.

The substantial work at Dale Units 3 and 4 also resulted in an increase in the hourly emission rates for SO<sub>2</sub>, NO<sub>x</sub>, and/or PM. These activities were modifications that subjected those units to the NSPS at 40 C.F.R. Part 60, Subpart Da. To date, East Kentucky has not complied with those regulations.

Under the applicable Title V permit regulations, East Kentucky was required to identify all applicable requirements, identify a compliance schedule for those applicable requirements for which the Dale plant was not already in compliance, and to certify its compliance with all applicable requirements. East Kentucky's Title V permit for the Dale plant does not address PSD or NSPS Subpart Da.

These violations of the Act and the State Implementation Plan ("SIP") of Kentucky have resulted in the release of massive quantities of SO<sub>2</sub>, NO<sub>x</sub>, and/or PM into the environment. Until these violations are corrected, the Dale Plant will continue to release massive quantities of illegal SO<sub>2</sub>, NO<sub>x</sub>, and/or PM into the environment.

## RELEVANT STATUTORY AND REGULATORY BACKGROUND

1. When the Act was passed in 1970, Congress exempted existing facilities, including the coal-fired power plant that is the subject of this NOV, from many of its requirements. However, in the 1977 CAA Amendments, Congress also made it quite clear that this exemption would not last forever. As the United States Court of Appeals for the D.C. Circuit explained in Alabama Power v. Costle, 636 F.2d 323 (D.C. Cir. 1979), "the statutory scheme intends to 'grandfather' existing industries; but...this is not to constitute a perpetual immunity from all standards under the PSD program." Rather, the Act requires grandfathered facilities to install modern pollution control devices whenever the

unit is proposed to be modified in such a way that its emissions may increase.

2. The PSD provisions require preconstruction review and permitting for modifications of stationary sources. Pursuant to applicable regulations, if a major stationary source located in an attainment area is planning to make a major modification, then that source must obtain a Prevention of Significant Deterioration ("PSD") permit. To obtain this permit, the source must agree to put on the best available control technology ("BACT") or in the case of a modification that is not major, must meet the emission limit called for under the applicable minor NSR program in the State SIP.
3. Pursuant to Part C of the Act, the SIP of Kentucky requires that no construction or operation of a major modification of a major stationary source occur in an area designated as attainment without first obtaining a permit. See: for PSD permits in attainment areas, Kentucky Administrative Regulation (KAR) 401 KAR 51:017, which was originally approved as part of the Kentucky SIP on September 1, 1989, at 54 Fed. Reg. 36307, and since amended.
4. The Kentucky SIP provisions identified in paragraph 3 above are all federally enforceable pursuant to Sections 110 and 113 of the Act.
5. Pursuant to Section 111 of the CAA, 42 U.S.C. § 7411, it is unlawful to operate a modified source in violation of applicable regulations.
6. Pursuant to 40 C.F.R. § 60.40a, the provisions of 40 C.F.R. Part 60, Subpart Da apply to electrical steam generating units, greater than 250 million BTU/hr in size, which are modified after September 18, 1978.
7. Pursuant to Section 502(a) of the Act, 42 U.S.C. § 7661(a), it is unlawful to operate without or in violation of a permit issued pursuant to subchapter V of the Act, 42 U.S.C. § 7661 *et. seq.*
8. Kentucky's program under subchapter V of the Act was granted interim approval by the Administrator on November 14, 1995, (60 Fed. Reg. 57186) and final approval on October 31, 2001, (66 Fed. Reg. 54953). These regulations are currently codified at 401 KAR 52.020. Pursuant to 401 KAR 52.020, Section (3)(1)(b), a source shall operate in compliance with a permit issued pursuant to that regulation.
9. Sections 4(1) and 5 of 401 KAR 52.020 require that a source submit a complete permit application which identifies all applicable requirements and information needed to determine applicable requirements for the source.
10. Section 5(8) of 401 KAR 52.020 requires that a permit application must contain a compliance plan for all applicable requirements for which the source is not in compliance.

11. Section 5(9) of 401 KAR 52.020 requires that a permit application must contain a certification of compliance with all applicable requirements.
12. Sections 21 and 23 of 401 KAR 52.020 require that a source submit compliance certifications annually.
13. Pursuant to 40 C.F.R. § 70.1(b), all subject sources shall have Title V permits which ensure compliance with all applicable requirements.
14. Section 113(a)(1) of the Act provides that at any time after the expiration of 30 days following the date of the issuance of this NOV, the Administrator may, without regard to the period of violation, issue an order requiring compliance with the requirements of the state implementation plan or permit, and/or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties of not more than \$25,000 per day for each violation on or before January 30, 1997, and no more than \$27,500 per day for each violation after January 30, 1997. Sections 113(a)(1) and 113(b) also provide that the Administrator may take the same actions to enforce violations of subchapter V of the Act, 42 U.S.C. § 7661 *et. seq.*
15. Section 167 of the Act, 42 U.S.C. § 7477, authorizes the Administrator to initiate an action for injunctive relief as necessary to prevent the construction, modification or operation of a major emitting facility which does not conform to the PSD requirements.
16. As provided in Sections 113(a)(1), 113 (b) and 167 of the Act, 42 U.S.C. §§ 7413(a)(1), 7413(b) and 7477, the violations set forth above subject East Kentucky to injunctive relief and civil penalties.

## **OPPORTUNITY FOR CONFERENCE**

Respondent may, upon request, confer with EPA. The conference will enable Respondent to present evidence bearing on the finding of violation, on the nature of violation, and on any efforts it may have taken or proposes to take to achieve compliance. Respondent has the right to be represented by counsel. A request for a conference must be made within 10 days of receipt of this NOV, and the request for a conference or other inquiries concerning the NOV should be made in writing to:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF:	)	
	)	Notice of Violation
Tampa Electric Company	)	
	)	EPA-CAA-2000-04-0007
Big Bend and Gannon	)	
Stations	)	
	)	
Proceedings Pursuant to	)	
Section 113(a)(1) of the	)	
Clean Air Act, 42 U.S.C.	)	
§7413(a)(1)	)	

**NOTICE OF VIOLATION**

This Notice of Violation ("NOV") is issued to the Tampa Electric Company ("TECO") for violations of the Clean Air Act ("Act") at the coal-fired power plants identified below. TECO has embarked on a program of modifications intended to extend the useful life, regain lost generating capacity, and/or increase capacity at their coal-fired power plants.

Commencing at various times since 1977 and continuing to today, TECO has modified and operated the coal-fired power plants identified below without obtaining New Source Review ("NSR") permits authorizing the construction and operation of physical modifications of its boiler units as required by the Act. In addition, for each physical modification at these power plants, TECO has operated these modifications without installing pollution control equipment required by the Act. These violations of the Act and the State Implementation Plan ("SIP") of Florida have resulted in the release of massive amounts of Sulfur Dioxides ("SO<sub>2</sub>"), Nitrogen Oxides ("NO<sub>x</sub>"), and particulate matter ("PM") into the environment. Until these violations are corrected, TECO will continue to release massive amounts of illegal SO<sub>2</sub>, NO<sub>x</sub>, and PM into the environment.

This NOV is issued pursuant to Section 113(a)(1) of the Act, as amended, 42 U.S.C.A. Sections 7401-7671q. Section 113(a) of the Act requires the Administrator of the United States Environmental Protection Agency ("EPA") to notify any person in violation of a state implementation plan or permit of the violations. The authority to issue this NOV has been delegated to the Regional Administrator for EPA Region 4 and further redelegated to the Director of the Air, Pesticides and Toxics Management Division for EPA, Region 4.

STATUTORY AND REGULATORY BACKGROUND

1. When the Clean Air Act was passed in 1970, Congress exempted existing facilities from many of its requirements. However, Congress also made it quite clear that this exemption would not last forever. As the United States Court of Appeals for the D.C. Circuit explained in Alabama Power v. Costle, 636 F.2d 323 (D.C. Cir. 1979), "the statutory scheme intends to 'grandfather' existing industries; but...this is not to constitute a perpetual immunity from all standards under the PSD program." Rather, the Act requires grandfathered facilities to install modern pollution control devices whenever the unit is proposed to be modified in such a way that its emissions may increase.
2. The NSR provisions of Parts C and D of Title I of the Act require preconstruction review and permitting for modifications of stationary sources. Pursuant to applicable regulations, if a major stationary source is planning upon making a major modification, then that source must obtain either a PSD permit or a nonattainment NSR permit, depending on whether the source is located in an attainment or a nonattainment area for the pollutant being increased above the significance level. If a major stationary source is planning on making a modification that is not major, it must obtain a general or "minor" NSR permit regardless of its location. To obtain the required permit, the source must agree to put on the best available control technology ("BACT") for an attainment pollutant or achieve the lowest achievable emission rate ("LAER") in a nonattainment area, or, in the case of a modification that is not major, must meet the emission limit called for under the applicable minor NSR program.
3. Pursuant to Part C of the Act, the Florida SIP requires that no construction or operation of a major modification of a major stationary source occur in an area designated as attainment without first obtaining a permit under 40 CFR Section 52.21 and the current Florida SIP Rule 62-212.400, Florida Administrative Code (F.A.C.). The PSD portion of the Florida SIP was originally approved by EPA on November 22, 1983 at 48 Fed. Reg. 52716, and amendments were later approved by EPA on October 20, 1994 at 59 Fed. Reg. 52916, and on January 11, 1995 at 60 Fed. Reg. 2688. No SIP-approval for PSD has been given to the State of Florida for power plants which are also subject to the Florida Power Plant Siting Act (PPSA). Rather, Florida has a fully delegated PSD program with respect to power plants subject

to the PPSA. Florida implements this delegation under 40 C.F.R. Section 52.21, whose provisions are incorporated by reference into the Florida SIP pursuant to 40 C.F.R. Section 52.530.

4. Pursuant to Part D of the Act, the Florida SIP requires that no construction or operation of a major modification of a major stationary source occur in an area designated as nonattainment without first obtaining a permit under 40 CFR Section 52.24 and the current Florida SIP Rule 62-212.500, F.A.C., as approved on November 22, 1983 at 48 Fed. Reg. 52716, and amended on October 20, 1994 at 59 Fed. Reg. 52916.
5. The Florida SIP Rule 62-212.300, F.A.C., provides that no emission unit or source subject to that rule shall be constructed without obtaining an air construction permit that meets the requirement of that rule. This rule was approved as part of the Florida SIP on October 20, 1994, at 59 Fed. Reg. 52916.
6. The SIP provisions identified in paragraphs 3, 4, and 5 above are all federally enforceable pursuant to Sections 110 and 113 of the Act.

#### FACTUAL BACKGROUND

7. TECO operates the Gannon Station, a fossil fuel-fired electric utility steam generating plant located at Port Sutton Road in Hillsborough County, Tampa, Florida. The plant consists of 6 boiler units with a total generating capacity of 1215 megawatts in 1998 and began operations in 1957.
8. TECO operates the Big Bend Station, a fossil fuel-fired electric utility steam generating plant located at Big Bend Station, Hillsborough County, Tampa, Florida 33619. The plant consists of 4 boiler units with a total generating capacity of 1795 megawatts in 1998 and began operations in 1971.
9. The Gannon and Big Bend Stations are both located in an area that has the following attainment/nonattainment classifications from 1980 to the present:

For NO<sub>2</sub>, the area has been classified as attainment from 1980 to the present.



For SO<sub>2</sub>, the area has been classified as attainment from 1980 to the present.

For PM, the area was classified as nonattainment from 1980 to April 2, 1990, for total suspended particulate matter. The area has been designated as attainment since April 2, 1990.

For ozone, the area has been classified as nonattainment until February 5, 1996 and attainment since that date.

10. Each of the plants identified in paragraphs 7 and 8 above emits or has the potential to emit at least 100 tons per year of NO<sub>x</sub>, SO<sub>2</sub> and/or PM and is a stationary source under the Act.

#### **VIOLATIONS**

##### **A. Gannon Station**

11. On numerous occasions between 1979 and the date of this Notice, TECO has made "modifications" of the Gannon Station as defined by both 40 CFR Section 52.21 and Florida SIP Rules 62-210.200 and 62-212.400, F.A.C. These modifications included, but are not limited to, the following individual modifications or projects: replacement of the furnace floor of Unit 3 in 1996; replacement of the cyclone burners of Unit 4 in 1994; and replacement of the 2<sup>nd</sup> radiant superheater of Unit 6 in 1992.
12. For each of the modifications that occurred at the Gannon Station, TECO did not obtain a PSD permit pursuant to 40 CFR Section 52.21 and Florida SIP Rule 62-212.400, F.A.C.; a nonattainment NSR permit pursuant to 40 CFR Section 52.24 and Rule 62-212.400, F.A.C.; nor a minor source permit pursuant to Rule 62-212.300, F.A.C. In addition, for modifications after 1992, no information was provided to the permitting agency of actual emissions after the modification in accordance with 40 CFR Section 52.21(b)(21)(v) and Rule 62-210.200(12)(d), F.A.C.
13. None of the modifications fall within the "routine maintenance, repair and replacement" exemption found at 40 CFR Section 52.21(b)(2)(iii)(a) and Florida SIP Rule 62-210.200(183)(a)1.a., F.A.C. Each of these changes was an expensive capital expenditure performed infrequently at the plant that constituted the replacement and/or redesign of a

boiler component with a long useful life. In each instance, the change was performed to increase capacity, regain lost capacity, and/or extend the life of the unit. In many instances, the original component was replaced with a component that was substantially redesigned in a manner that increased emissions. That the "routine maintenance, repair and replacement" exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7<sup>th</sup> Cir. 1990).

14. None of these modifications fall within the "increase in hours of operation or in the production rate" exemption found at 40 CFR § 52.21(b)(2)(iii)(f), or Florida regulation 62-210.200(183)(a)2., F.A.C. This exemption is limited to stand-alone increases in operating hours or production rates, not where such increases follow or are otherwise linked to construction activity. That the hours of operation/rates of production exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld twice by the court of appeals, in 1989 and in 1990. Puerto Rican Cement Co. v. EPA, 889 F.2d 292 (1<sup>st</sup> Cir. 1989); Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7<sup>th</sup> Cir. 1990).
15. None of these modifications fall within the "demand growth" exemption found at 40 CFR Section 52.21(b)(33)(ii) and Florida SIP Rule 62-210.200(12)(d), F.A.C., because for each modification a physical change was performed which resulted in the emissions increase.
16. Each of these modifications resulted in a net significant increase in emissions from Gannon Station for NO<sub>x</sub>, SO<sub>2</sub> and/or PM as defined by 40 CFR Sections 52.21(b)(3) and (23) and Florida SIP Rule 62-212.400(2)(e)2., F.A.C.
17. Therefore, TECO violated and continues to violate 40 CFR Section 52.21 and Florida SIP Rule 62-212.400, F.A.C., for the prevention of significant deterioration; 40 CFR Section 52.24 and Rule 62-212.500, F.A.C., for preconstruction

review for nonattainment areas; and/or Rule 62-212.300, F.A.C., by constructing and operating modifications at the Gannon Station without the necessary permit required by the Florida SIP.

18. Each of these violations exists from the date of start of construction of the modification until the time that TECO obtains the appropriate NSR permit and operates the necessary pollution control equipment to satisfy the Florida SIP .

B. Big Bend Station

19. On numerous occasions between 1979 and the date of this Notice, TECO has made "modifications" at its Big Bend Station as defined by both 40 CFR Section 52.21 and Florida SIP Rule 62-212.400, F.A.C. These modifications included, but are not limited to, the following individual modifications or projects: replacement of steam drum internals on Units 1 and 2 in 1994 and 1991 respectively; and high temperature reheater replacement and waterwall addition for Unit 2 in 1994.
20. For each of the modifications that occurred at the Big Bend Station, TECO did not obtain a PSD permit pursuant to 40 CFR Section 52.21 and Florida SIP Rule 62-212.400, F.A.C.; a nonattainment NSR permit pursuant to 40 CFR Section 52.24 and Rule 62-212.400, F.A.C.; or a minor NSR permit pursuant to Rule 62-212.300, F.A.C. In addition, for modifications after 1992, no information was provided to the permitting agency of actual emissions after the modification as required by 40 CFR Section 52.21(b)(21)(v) and Rule 62-210.200(12)(d), F.A.C.
21. None of these modifications fall within the "routine maintenance, repair and replacement" exemption found at 40 CFR Section 52.21(b)(2)(iii)(a) and Florida SIP Rule 62-210.200(183)(a)1.a., F.A.C. Each of these changes was an expensive capital expenditure performed infrequently at the plant that constituted the replacement and/or redesign of a boiler component with a long useful life. In each instance, the change was performed to increase capacity, regain lost capacity, and/or extend the life of the unit. In many instances, the original component was replaced with a component that was substantially redesigned in a manner that increased emissions. That the "routine maintenance, repair and replacement" exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized

applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7<sup>th</sup> Cir. 1990).

22. None of these modifications fall within the "increase in hours of operation or in the production rate" exemption found at 40 CFR § 52.21(b)(2)(iii)(f), or Florida regulation 62-210.200(183)(a)2., F.A.C. This exemption is limited to stand-alone increases in operating hours or production rates, not where such increases follow or are otherwise linked to construction activity. That the hours of operation/rates of production exemption does not apply where construction activity is at issue was known to the utility industry since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld twice by the court of appeals, in 1989 and in 1990. Puerto Rican Cement Co. v. EPA, 889 F.2d 292 (1<sup>st</sup> Cir. 1989); Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7<sup>th</sup> Cir. 1990).
23. None of these modifications fall within the "demand growth" exemption found at 40 CFR Section 52.21(b)(33)(ii) and Florida SIP Rule 62-210.200(12)(d), F.A.C., because for each modification a physical change was performed which resulted in the emissions increase.
24. Each of these modifications resulted in a net significant increase in emissions from Big Bend Station for NO<sub>x</sub>, SO<sub>2</sub> and/or PM as defined by 40 CFR Sections 52.21(b)(3) and (23) and Florida SIP Rule 62-212.400(2)(e)2., F.A.C.
25. Therefore, TECO violated and continues to violate 40 CFR Section 52.21 and Florida SIP Rule 62-212.400, F.A.C., for the prevention of significant deterioration; 40 CFR Section 52.24 and Rule 62-212.500, F.A.C., for preconstruction review for nonattainment areas; and/or Rule 62-212.300, F.A.C., by constructing and operating modifications at the Big Bend Station without the necessary permit required by the Florida SIP.
26. Each of these violations exists from the date of start of construction of the modification until the time that TECO obtains the appropriate NSR permit and operates the necessary pollution control equipment to satisfy the Florida

SIP.

### ENFORCEMENT

Section 113(a)(1) of the Act provides that at any time after the expiration of 30 days following the date of the issuance of this NOV, the Regional Administrator may, without regard to the period of violation, issue an order requiring compliance with the requirements of the state implementation plan or permit, and/or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties of not more than \$25,000 per day for each violation on or before January 30, 1997, and no more than \$27,500 per day for each violation after January 30, 1997.

### OPPORTUNITY FOR CONFERENCE

Respondent may, upon request, confer with EPA. The conference will enable Respondent to present evidence bearing on the finding of violation, on the nature of violation, and on any efforts it may have taken or proposes to take to achieve compliance. Respondent has a right to be represented by counsel. A request for a conference must be made within 10 days of receipt of this NOV, and the request for a conference or other inquiries concerning the NOV should be made in writing to:

Charles V. Mikalian  
Associate Regional Counsel  
Environmental Accountability Division  
U.S. EPA  
61 Forsyth Street, SW  
Atlanta, GA 30303  
404-562-9575

<hr/> Date		<hr/> John H. Hankinson, Jr. Regional Administrator EPA, Region 4		
<hr/> Mikalian	<hr/> Dion	<hr/> Tommelleo	<hr/> Hewson	<hr/> Dubose
<hr/> Spagg	<hr/> Kutzman	<hr/> Smith	<hr/> Lynch	

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Hankinson